

# HOUSE . . . . . No. 1857

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By Mr. Walsh of Boston, petition of Martin J. Walsh relative to employees' rights to recover amounts unpaid by employers to the Workers' Compensation Special Fund. Labor and Workforce Development.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand and Seven.

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### AN ACT TO PROTECT HONEST BUSINESSES AND EMPLOYERS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1     Section 25C of Chapter 152 of the General Laws as appearing in  
2 the 2002 Official Edition is hereby amended by adding at the end the  
3 following:—  
4     (11) Private Right of Action to Recover Workers Compensation  
5 Coverage Payments  
6     Where either the Commissioner of Insurance, the Massachusetts  
7 attorney general, or a superior court decides that probable cause  
8 exists to show that an employer has not fully complied with this  
9 chapter, then any 10 persons may bring on behalf, and in the name,  
10 of the Workers Compensation Special Fund established by this  
11 chapter at Section 65 a civil action to recover amounts which by law  
12 should have been paid by the employer pursuant to this chapter to  
13 cover the employer's employees who engaged in employment in  
14 Massachusetts. Such persons may petition in writing that the Com-  
15 missioner of Insurance, the attorney general or a court hold a prob-  
16 able cause hearing to make a decision as to whether such probable  
17 cause exists, and shall serve a copy of the petition to the employer  
18 named within five days. The Commissioner of Insurance, the  
19 attorney general, or the court in which such a petition was filed shall  
20 hold a hearing within 30 days, and after the conclusion of said  
21 hearing, shall render a decision within 30 additional days. The deci-  
22 sion may be appealed when a cause of action filed under this section  
23 has been finally adjudicated, unless the petition is denied. At the  
24 hearing, it shall be *prima facie* evidence that such probable cause  
25 exists if it is shown that:

26        i) An employee was paid any portion of wages in cash currency  
27        with no deductions or taxes withheld;  
28        ii) No accompanying pay slip or check showing the wage pay-  
29        ment and withholdings or deductions as required in GL c. 149,  
30        Section 148 was provided;  
31        iii) An individual was misclassified as an independent contractor  
32        where the individual was in fact an employee;  
33        iv) Wages were not timely paid;  
34        v) The employer failed to withhold from the employee's wages all  
35        related state taxes; or  
36        vi) Employees have not been properly reported on GL 149, §27B  
37        certified payroll records.

38        Nothing contained above, however, shall be construed as limiting  
39        or prohibiting in any way whatsoever other information that might  
40        be used to establish the requisite probable cause that this chapter was  
41        not fully complied with, and any information produced need not be  
42        admissible at a trial. At the probable cause hearing, it is not grounds  
43        for objecting that the information produced will be inadmissible in a  
44        trial if the information appears reasonably sufficient that it might  
45        lead to the discovery of other information that could be admissible at  
46        a trial.

47        After the decision that such probable cause exists has been made,  
48        the persons who brought the petition shall serve a copy of the deci-  
49        sion on any insurer that was or is entitled to collect amounts not paid  
50        and the persons shall simultaneously state any intention to file suit  
51        under this section. At least 90 days after such service, the persons  
52        may file a civil action in accord with this section. Any persons who  
53        prevail in an action filed pursuant to this section shall be entitled to  
54        recover 25 percent of the amounts unlawfully not paid or \$25,000,  
55        whichever is less, plus costs and reasonable attorneys fees, as well as  
56        an additional amount from the defendant(s) as liquidated damages  
57        equal to 25 percent of the amount not paid or \$25,000, whichever is  
58        less. Such liquidated damages are not intended to be penal or puni-  
59        tive, but compensatory. After an action under this section is filed in a  
60        court, any insurer that failed to file a complaint or seek arbitration to  
61        recover or collect all the amounts which would have been due to the  
62        insurer from a defendant in such action shall be prohibited from  
63        attempting to recover or collect any amounts sought in the action  
64        which the insurer failed to seek to recover or collect, unless the

65 insurer obtains the written and voluntary consent of the persons who  
66 have initiated the suit under this section. When such written consent  
67 is provided, a court may substitute the insurer as the plaintiff. When  
68 the insurer is substituted as the plaintiff, then the case shall proceed  
69 without further regard to this section or the Workers' Compensation  
70 Special Fund.

71 No settlement made between any insured and any insurer shall be  
72 deemed to prohibit or limit an action under this section to recover  
73 other amounts that should have been paid to cover employees under  
74 this chapter and which the insurer did not recover by such settlement  
75 or otherwise.

76 Except as provided herein and unless the insurer has been substi-  
77 tuted in the action, any amounts recovered by the persons who filed  
78 the civil action under this section shall be deposited into the  
79 Workers' Compensation Special Fund established pursuant to  
80 section 65 of this chapter, except those amounts payable to such per-  
81 sons in accord with this section. Any insurer, however, who pays any  
82 claim may recover from the amounts that are deposited into the  
83 Special Fund any premium that should have been paid to that insurer  
84 which would have provided coverage for that specific claimant and  
85 claim.

86 Nothing contained herein shall be deemed as limiting or pro-  
87 hibiting in any way whatsoever any political subdivision, public  
88 entity or office, for example, any division, commission, commis-  
89 sioner, director, attorney general, and any law enforcement entity or  
90 office, presently entitled to bring any action, criminal or civil,  
91 against a defendant(s) to an action under this section from pro-  
92 ceeding against such defendant in any appropriate forum. The  
93 forum, court, or agency, however, may consider and offset the  
94 amounts recovered, or likely recoverable, by an action pursuant to  
95 this section in imposing a verdict or judgment, or against imposing a  
96 fine or other penalty.

97 The section shall not affect, or apply to, insurance contracts that  
98 were made before the date this section becomes law. In addition to  
99 what is contained above, any action filed under this section may be  
100 filed only after 90 days following the expiration of the then present  
101 term of the workers compensation policy effected by the action, if  
102 one existed.